STATE OF MICHIGAN

COURT OF APPEALS

CITY OF ESSEXVILLE,

Plaintiff-Appellant,

v

CARROLLTON CONCRETE MIX, INC., a/k/a CARROLLTON CONCRETE MIX, a/k/a CARROLLTON PAVING COMPANY, a/k/a CARROLLTON CONCRETE MIX COMPANY,

Defendant-Appellee.

UNPUBLISHED
March 29, 2007

No. 263757
Bay Circuit Court
LC No. 00-003732-AZ

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

In this zoning dispute, plaintiff appeals as of right an order denying its motion for a new trial. This dispute has been the subject of a prior appeal to this Court, *Essexville v Carrollton Concrete Mix, Inc*, 259 Mich App 257; 673 NW2d 815 (2003). Following an amendment to plaintiff's zoning ordinance, Carrollton enjoys a nonconforming use on its riverfront property.[1] On remand, the trial court determined the scope of that nonconforming use. We affirm.

Plaintiff argues that the court erred in considering Carrollton's historical use of the property when determining the scope of the nonconforming use. We disagree. Plaintiff presented this argument to the court below through a motion for a new trial. We review a denial of a new trial motion for an abuse of discretion. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006).[2]

---

[1] The relevant specific history of this dispute is set forth in our prior opinion. *Essexville*, *supra* at 259-265.

[2] A trial court's legal ruling regarding a zoning ordinance is reviewed de novo, but the trial court's factual findings are given considerable deference and generally will not be disturbed on appeal. *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 525-526; 569 NW2d 841 (1997). On appeal, plaintiff challenges the trial court's application of the law and does not take issue with the trial court's factual findings.

Zoning regulation is designed to achieve the orderly development and use of land to promote the general welfare. See MCL 125.3201. Such regulation, however, is "subject to vested property interests acquired before" it becomes effective. *Lansing v Dawley*, 247 Mich 394, 396; 225 NW 500 (1929). "A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date." *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627 (1993). Though "one of the goals of local zoning is the gradual elimination of nonconforming uses," *Century Cellunet of Southern Michigan Ltd Partnership v Summit Twp*, 250 Mich App 543, 546; 655 NW2d 245 (2002), the Legislature has provided statutory protection of nonconforming uses, *Kopietz v Clarkston Zoning Bd of Appeals*, 211 Mich App 666, 675; 535 NW2d 910 (1995).

In effect during the circumstances of this dispute, MCL 125.583a(1)[3] provided that

> [t]he lawful use of land or a structure exactly as the land or structure existed at the time of the enactment of the ordinance affecting that land or structure, may be continued, except as otherwise provided in this act, although that use or structure does not conform with the ordinance.

Under this provision, a valid zoning ordinance may preclude the "enlargement, expansion, or extension of nonconforming uses but also provide for the diminution of nonconforming uses without requiring cessation. In so doing, the proper balance is struck between the municipality's interest in gradually eliminating nonconforming uses and the property owner's constitutionally protected rights in the use of his property." *Kopietz, supra* at 675. Plaintiff has regulated nonconforming uses pursuant to this authority.[4]

"[It] is the law of Michigan that the continuation of a nonconforming use must be substantially of the same size and same essential nature as the use existing at the time of passage of a valid zoning ordinance." *Norton Shores v Carr*, 81 Mich App 715, 720; 265 NW2d 802

---

[3] The City and Village Zoning Act (CVZA), MCL 125.581 *et seq*., was repealed on July 1, 2006 by the Michigan Zoning Enabling Act, MCL 125.3101 *et seq.* 2006 PA 110, § 702(1)(a).

[4] Section 6.2 of the Essexville Zoning Ordinance declares that the ordinance is designed to

> permit the continuance of a lawful use of any building or land existing at the effective date of this Ordinance. However, except as herein provided, no building, structure, or use or part thereof shall be used, altered, constructed or reconstructed except in conformity with the provisions of this Ordinance, and further, it is hereby declared that the existence of non-conforming uses is contrary to the best interests of the general public. Further, it is hereby declared to be the policy of this community, as expressed in this Ordinance, to discontinue non-conforming uses in the course of time as circumstances permit, having full regard for the rights of all parties concerned.

(1978) (internal quotation marks and citations omitted); see also *Summit Twp, supra* at 546; *White Lake Twp v Lustig*, 10 Mich App 665, 673-674; 160 NW2d 353 (1968).

Plaintiff's argument that the nature and scope of the nonconforming use must be evaluated by reference only to the activity actually occurring on the date the ordinance is passed is without merit. In *Fredal v Forster*, 9 Mich App 215; 156 NW2d 606 (1967), the defendant acquired a parcel of property in 1934, and intermittently and sporadically thereafter "quarried portions of the parcel through various licensees and lessees." *Id.* at 221, 222. Between 1930 and 1960 "some quarrying" occurred in the northwest quarter of the parcel. *Id.* at 222. Between 1956 and 1958, over 50,000 cubic yards of gravel were removed from the northeast quarter. *Id.* at 222-223. In 1963, the property was rezoned residential. *Id.* at 223. Nearby residents instituted litigation to abate the defendant's operation. *Id.* at 223-224. The trial court concluded that the defendant did not enjoy nonconforming uses in the northwest and northeast quarters. *Id.* at 224-225. We reversed, reasoning that in the northeast quarter,

> quarrying was carried on for 3 years and over 50,000 cubic yards were removed more than 5 years before enactment of the ordinance. . . . [W]e find that defendant has an established nonconforming use in the northeasterly section of his parcel. . . .
>
> In the northwesterly section, quarrying was carried on for some 30 years prior to enactment, the last use being about 1960. The trial court found this use to have been abandoned in 1960 or 1961. We find that the evidence does not support such a conclusion of abandonment. . . . [*Id.* at 231.]

See also *Rochester Hills v Southeastern Oakland Co Resource Recovery Auth*, 192 Mich App 385; 481 NW2d 753 (1991), rev'd on other grounds 440 Mich 852 (1992) (reviewing the nature of the defendant's conduct over a period of years prior to a zoning amendment in evaluating whether a nonconforming use was established); *White Lake, supra* at 668-676 (affirming a trial court's disposition limiting a party's car "junking" to "approximately 5 cars at one time" where that party's predecessor in interest had utilized the property for "1, 2, 3 or at most 5 cars on the premises at any one time" during the eight years prior to the passage of an ordinance prohibiting this conduct).

As evidenced by the foregoing, evaluating the nature and scope of a nonconforming use requires considerations beyond merely assessing conditions on the date an ordinance is passed that makes the use nonconforming. *Rochester Hills, supra* at 385; *White Lake, supra* at 668-676; *Fredal, supra* at 230-231. Rather, these determinations involve considering the historical use of the property. The date of the amendment or enactment establishes an endpoint on what activity may be considered for purposes of determining the existence, nature, or scope of a nonconforming use, i.e., that activity occurring prior to its adoption. MCL 125.583a(1). In other words, the date of enactment operates to bar consideration of activity occurring after the ordinance is adopted, except to the extent that it is consistent with the activity occurring prior to the adoption of the ordinance. However, that date does not circumscribe the scope of the inquiry to the extent plaintiff urges. See *Rochester Hills, supra* at 385; *White Lake, supra* at 668-676; *Fredal, supra* at 230-231. Restricting consideration of the particular conduct or activities to that occurring only on the date the ordinance is passed would result in a capricious evaluation. For

example, this reasoning could cause a business' use to be unduly limited if the ordinance were passed on a "slow day." Further, such a rule would be ripe for game playing or manipulation. An ordinance could deliberately be made effective on the day after a junk yard holds it annual sale, or a used tire collection facility sends the tires to a recycler. Or, a property owner might commence a non-conforming use the day before an ordinance becomes effective simply to create a non-conforming use. Contrary to defendant's argument, the historical use of the property up to and including the effective date of the ordinance provides the most accurate indication of the existence and scope of a nonconforming use.

Plaintiff also argues that the specific language of MCL 125.583a(1) requires that only the ordinance passage date be considered, because such an approach protects "[t]he lawful use of land or a structure *exactly* as the land or structure existed at the time of the enactment of the ordinance affecting that land or structure." MCL 125.583a(1) (emphasis added). This is a misinterpretation of the statute. MCL 125.583a(1) plainly preserves the "land or structure" as it "exactly . . . existed" on the date the ordinance was passed. MCL 125.583a(1). It does not preserve the "use" as it was exactly on that date. As this is unambiguous, we enforce it accordingly. *Ayar v Foodland Distributors*, 472 Mich 713, 716; 698 NW2d 875 (2005).

Because the court did not err in considering the life of Carrollton's use of the subject property, it did not abuse its discretion in denying plaintiff's new trial motion. *Allard, supra* at 406.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Stephen L. Borrello